MOTION FILED
FEB 2 1985

No. 84-468

In the

Supreme Court of the United States

October Term, 1984

City of Cleburne, Texas, et al.,
Petitioners,

-v.-

Cleburne Living Center, Inc., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR PERMISSION TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR THE NATIONAL CONFERENCE OF CATHOLIC CHARITIES, NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS INC., NATIONAL ASSOCIATION OF PRIVATE RESIDENTIAL FACILITIES FOR THE MENTALLY RETARDED, INC., NATIONAL REHABILITATION ASSOCIATION, INTERNATIONAL LEAGUE OF SOCIETIES FOR PERSONS WITH MENTAL HANDICAP, AND TEXAS ASSOCIATION OF PRIVATE ICF/MR PROVIDERS, INC.

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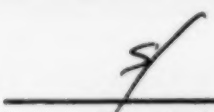
The National Conference of Catholic Charities, the National Association of Protection and Advocacy Systems, Inc. (NAPAS), the National Association of Private Residential Facilities for the Mentally Retarded, Inc. (NAPRFMR), the National Rehabilitation Association, the International League of Societies for Persons with Mental Handicap, and the Texas Association of Private ICF/MR Providers, Inc. respectfully move this Court for permission to file the accompanying brief *Amicus Curiae* in support of respondents. Consent to file this brief has been sought from the parties. Respondents have consented but counsel for Petitioners never replied. Leave of this Court therefore is requested under Rule 36.

The interest of the *amici* is set forth below. The accompanying brief addresses issues of fact and law pertaining to community attitudes toward, and community acceptance of, community-based residential facilities for the mentally retarded, and the need for such community based housing opportunities by mentally retarded people. *Amici* also provide background information in the form of research studies discussing the asserted rationales of the petitioners to prohibit the establishment of the group home proposed by respondents. These issues have not been discussed by petitioners, and *amici* have reason to believe that their brief will supplement rather than reiterate the arguments made by respondents.



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INTEREST OF THE *AMICI*

National Conference of Catholic Charities

The National Conference of Catholic Charities is the national coordinating body for human services provided by the 170 dioceses of the Roman Catholic Church. The National Conference conducts research, disseminates information and publishes *Charities USA* and *Social Thought*. The Conference also conducts training programs, seminars and other activities to assist local agencies to better carry out their programs. It also acts as the government relations liaison for the local programs. One of the many services delivered nationally through more than 1,000 agencies is the operation of community based housing facilities for mentally retarded people. Agencies of the Roman Catholic Church are one of the largest providers of such community based living arrangements in the United States.

National Association of Protection Advocacy Systems, Inc.

The National Association of Protection and Advocacy Systems, Inc. (NAPAS) is a national association consisting of the state- and territorial-wide protection and advocacy systems for the developmentally disabled, as mandated by the federal Developmentally Disabled Assistance and Bill of Rights Act. 42 U.S.C. 6001 *et seq.* NAPAS members have, as part of their mandate, the pursuit of "legal, administrative, and other appropriate remedies to insure the protection of the rights" of mentally retarded and developmentally disabled persons. 42 U.S.C. § 6012. They devote significant resources to the problems of developing appropriate community-based living arrangements, including providing information about mental retardation to local officials and community residents to alleviate community opposition to group homes, when it arises.

National Association of Private Residential Facilities For the Mentally Retarded, Inc.

The National Association of Private Residential Facilities for the Mentally Retarded, Inc. (NAPRFMR) is a national association that represents and assists approximately 500 providers of community-based residential care and services to approximately 20,000 people with developmental disabilities in 48 states and the District of Columbia. NAPRFMR conducts legislative advocacy, training programs and other activities to enable providers to appropriately meet the needs of their clients and improve the quality of life of the people they serve. Eligibility for active membership is restricted to facilities whose population is comprised primarily of people who are mentally retarded. The facility must also be licensed, certified or approved in its home state if such licensing, certification or approval is required by the state. NAPRFMR members range in size from family care homes serving one or two persons to large multi-service agencies which serve more than one hundred people at a single site. About 41% of its members serve 16 or fewer persons, 33% serve 17 to 50 persons, 15% serve between 50 and 100 persons and 14% serve more than 100 individuals. Together they offer a full range of residential services. Many are certified as intermediate care facilities for the mentally retarded under the Medicaid program. About 60% of the NAPRFMR members are nonprofit agencies, approximately 30% are proprietary and 10% are unincorporated family care providers.

National Rehabilitation Association

The National Rehabilitation Association is a national organization comprised of disabled persons including those with mental retardation, professional rehabilitation workers, medical professionals and others advocating for and providing rehabilitation and habilitation services to persons with disabilities. The Association's purpose is to develop the public awareness of the need for, and advocate the removal of attitudinal, architectural and legal barriers that prevent the full integration of disabled people into society. It achieves its purposes through legislative

advocacy, sponsorship of research, publication of the *Journal of Rehabilitation*, and by conducting educational, informational and training programs.

International League of Societies For Persons With Mental Handicap

The International League of Societies for Persons with Mental Handicap is composed of eighty-six organizations in sixty-five countries on five continents dedicated to advancing the rights and interests of mentally handicapped people. The individual members of these organizations are consumers, parents, educators, therapists, jurists, doctors and other professionals in the field of mental retardation. Founded in 1960, the International League has consultative status with UNESCO, the Council of Europe and other international agencies. Among its other activities, the International League provides experts who offer technical assistance in developing services for mentally handicapped individuals, including residential services, develops and disseminates educational literature concerning their rights and needs, and helps promote the provision of services necessary to enable these citizens to participate fully in society to their maximum potential.

Texas Association of Private ICF/MR Providers

The Texas Association of Private ICF/MR Providers is a statewide association consisting of 27 private organizations in Texas that provide community-based residential care and services in 80 settings to approximately 3,700 mentally retarded and developmentally disabled people. Respondent Cleburne Living Center (now called Community Living Concepts) is a member of the Association. The Association conducts advocacy with the Texas Legislature and State agencies responsible for regulating community-based residential facilities certified as ICF/MRs, and provides training and information to its members so that the mentally retarded people they serve obtain the highest quality of services and attain the highest quality of life that is possible.

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SUMMARY OF ARGUMENT

The discrimination practiced by the City of Cleburne, Texas against thirteen mildly to moderately mentally retarded adults who would live in a group home in that community is a classic example of historic deep-seated prejudice that still lingers in some communities. The prejudice against the retarded shown here, like most prejudice, is the result of ignorance and irrational fear. As the Court of Appeals pointedly observed, the prejudice results in "segregation of one group from the rest of society", and "[s]uch segregation perpetuates false stereotypes about the exiled group and leads to a virtual caste system built on misconceptions". (J.A. 114; 726 F.2d at 192).

The actual experience of communities in which mentally retarded people live in group homes demonstrates that no rational basis exists for the exclusion of such a group home from an area in Cleburne which is open to virtually every other form of residential setting and institution, from single family homes to boarding houses, apartment houses, hospitals and nursing homes, without any requirement of a special use permit. Most communities have accepted group homes for mentally retarded persons without opposition and no adverse consequences have resulted. Moreover, housing is perhaps the most pressing need of mentally retarded people, partially because of the increasing numbers of older retarded adults and partly because of the public policy of deinstitutionalization.

Experience has demonstrated that mentally retarded persons make good neighbors. For example, they are not prone to violent or criminal behavior and their involvement with the police is substantially lower than that of the population generally. Group homes have had no adverse impacts on property values and have not resulted in changing neighborhood characteristics. The ultimate judgment on group homes is found in communities that originally opposed their establishment. Once the homes were established community acceptance almost inevitably followed.

The City of Cleburne rejected the special use permit based on the irrational fears and in part on ostensible "protection" of the mentally retarded residents. The City Council had no knowl-

edge of the needs of mentally retarded persons and acted without guidelines to deny a permit even though the home met the extensive federal and state regulations governing these group homes.

The true exclusionary purpose of the City Council's action is revealed by the tortured argument that the home is a "hospital" even though no physicians or registered nurses are regularly on the premises. The City Council also applied criteria of a five hundred year flood plain to a group home with completely ambulatory persons while allowing bed-ridden hospital and nursing home patients to live in the very same location. It applied space and density requirements to the group home on an ad hoc basis when the City does not apply any such restrictions to any other residential use, or to hospitals or nursing homes. The special use permit was denied to the group home even though it met all the requirements of federal and state regulations in effect at the time the application was rejected.

For these reasons, *amici curiae* submit that the decision below should be affirmed under the "rational basis test". *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973). If this Court were to reach the issue of whether heightened judicial scrutiny of discriminatory treatment of the retarded is appropriate, *amici curiae* agree with the analysis of the Court of Appeals panel decision (J.A. 112 *et seq.* 726 F.2d 192) that the mentally retarded fit precisely within the category of the discrete and insular minority that commands extraordinary protection from the majoritarian political process. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973).

I. EXPERIENCE, DOCUMENTED BY STUDIES, HAS PROVED THAT THE MENTALLY RETARDED PERSONS LIVING IN GROUP HOMES MAKE GOOD NEIGHBORS AND DO NOT AFFECT THE SAFETY OR CHARACTER OF NEIGHBORHOODS OR PROPERTY VALUES.

When group homes for mentally retarded people have been permitted to open, integration into community life of both the homes and their residents, and eventual community acceptance

are the rule, even in communities that expressed initial hostility. Rothman and Rothman describe the end result:

> Communities invariably took their defeats gracefully. Once a group home opened, it was never the object of vandalism or even picketing. Not one group home for the Willowbrook class had to close down or transfer its residents because of the persistent hostility of local organizations. Not a single member of the Willowbrook class living in a group home was ever injured or so much as intimidated by antagonistic neighbors. Controversy preceded the opening of a residence. But once the home was in business, indifference, and even occasionally approval, took over.

D. Rothman & S. Rothman, The Willowbrook Wars: A Decade of Struggle for Social Justice 196 (1984).

A. Most Of The Six And One Half Million Mentally Retarded Americans Already Reside In The General Community

Mental retardation is estimated to affect as many as six and one half million Americans (T. 141) who can be found in every state, at every age level, and among all races, ethnic groups and economic classes. Most mentally retarded individuals live, learn, work and play in our communities: as children, living at home and attending our public schools; as adults, living independently if they are able or living with relatives or in group homes if they are not.[1] "At no time have more than approximately 3% of

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1 The District Court found that "[g]roup homes currently are the principal community living alternatives for persons who are mentally retarded." (J.A. 94, Finding of Fact 30). There are no such group homes in Cleburne. (J.A. 94, Finding of Fact 31). It is more accurate to say that group homes are the principal living alternatives for those whose parents are too old, ill or otherwise unable to care for them and for those leaving large institutional

(Footnote continued on next page)

the total mentally retarded population ever resided in an institution."[2] R. Scheerenberger, *Deinstitutionalization: Trends and Difficulties*, in Deinstitutionalization and Community Adjustment of Mentally Retarded People 3 (R. Bruininks, *et al.* Eds. 1981). In 1983, it was estimated that 110,000 to 130,000 persons live in large institutions. Janicki, Mayeda & Epple, *Availability of Group Homes for Persons with Mental Retardation in the United States*, 21 Mental Retardation 45, 49 (1983).

Cleburne is no different from other communities in regard to the mentally retarded people in its midst. There are at least 30 mentally retarded children in the City's public schools (J.A. 92, Finding of Fact 21) and the record identified other mentally retarded adults who are living at home with their parents (Tr. 125-26; 186; 213; 217; 221; 226-41) or in a local nursing home with an aged relative (Tr. 186; 214; 217). There also is a sheltered workshop in the City offering employment to mentally retarded workers. (Tr. 71; 221; 225). For those Cleburne residents who would live in the group home (Tr. 125-26; 186; 213-14; 217; 221; 226-41), the establishment of that home would do no more

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(Footnote continued from previous page)

residences. *See*, R. Bruininks *et al.*, *Recent Growth and Status of Community Residence Alternatives*, in Deinstitutionalization and Community Adjustment of Mentally Retarded People 15 (R. Bruininks, *et al.* Eds. 1981) (prevention of admission to institutions by finding and developing alternative community methods of care and training is one of the core concepts of deinstitutionalization); B. Baker, Seltzer & Seltzer, As Close As Possible: Community Residences for Mentally Retarded Adults 3 (1974) (group homes are required for people who are unable to continue living with their parents, but cannot live on their own); (T. 71) (group homes needed for never-institutionalized people whose parents are of advancing age as well as for bringing previously institutionalized people back to their communities).

2 The term "institutions" in the literature generally refers to a large, segregated facility. Small group homes such as those involved in Cleburne are regarded as community based residential facilities.

than allow them to move from one supervised living setting in Cleburne to another. (T. 71)[3]

B. Housing In The Community Is Perhaps The Most Pressing Current Need Of Mentally Retarded People.

The need for appropriate community-based housing for mentally retarded people has increased drastically in the last twenty years as a result of the development of federal and state policies and programs for community rather than institutional care of all mentally retarded people. A consensus favoring community care has emerged among governmental decision makers and professional experts based on the principles of normalization, least restrictive alternative and the developmental model of programs and services. These concepts are directly opposed to the historical predominance of institutional care, which isolates people from the rhythms and opportunities of an integrated community life.[4]

In 1963, President Kennedy presented a legislative package offering a "bold new initiative" to "reduce over a number of years, and by hundreds of thousands, the persons confined to . . . institutions" and "to retain in and return to the community the . . . mentally retarded". President's Message, 88th Cong. 1st Sess., *reprinted in* [1963] U.S. Code Cong. & Admin. News, 1466, 1467-68 (Feb. 5, 1963). Congress has since enacted a series of laws to achieve this goal. See appendix A for a listing of these acts.

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3 *See New York State Association for Retarded Children v. Carey*, 706 F.2d 956, 966 (2d Cir. 1983) (New York State has borough or county of origin program for community return of institutionalized mentally retarded people, in part to improve community acceptance and allay concern that group home residents are outsiders).

4 *See* Nirje, *The Normalization Principle and Its Human Management Implications* in President's Committee on Mental Retardation, Changing Patterns in Residential Services for the Mentally Retarded, 179, 186-87 (R. Kugel & W. Wolfensberger Eds. 1969) (the size, regimentation, and monotony of institutions make it impossible for them to maintain normal rhythms of daily personal care, vocational or leisure activities).

In one important development Congress amended the Housing Act of 1959, 12 U.S.C. § 1701q, to include subsidies for construction of residential facilities for developmentally disabled persons. Housing and Community Development Act of 1974, P.L. 93-383, § 210(b), 88 Stat. 633 (1974). At least fifty million dollars annually must be made available for programs for the handicapped, 12 U.S.C. § 1701(h). Congress has also funded both construction and operation of community group homes for the mentally retarded by classifying them as Intermediate Care Facilities (ICF-MR) eligible for reimbursement under the Medicaid program. 42 U.S.C. § 1396d(c) and (d). The group home respondents would establish in Cleburne will be such an ICF-MR facility. (J.A. 92, Finding of Fact 20).[5]

In another enactment, the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6001 *et seq.* (1976), Congress stated that developmentally disabled people should receive services designed to maximize their developmental potential in a setting that is least restrictive of their personal liberty. 42 U.S.C. § 6010(2).[6]

Nonetheless, the current unmet demand for community residence spaces is overwhelming. Although New York operates one of the largest group home programs in the nation, it is

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5 States have adopted similar community integration programs. *See, e.g.*, Texas Mental Health and Mental Retardation Act of 1965, Tex. Rev. Civ. Stat., art. 5547-201 *et seq.*; Texas Mentally Retarded Persons Act of 1977, Tex. Rev. Civ. Stat., art. 5547-300; New York Mental Hygiene Law § 41.33, 41.34; 41.36 and 41.37; Georgia Community Services Act for the Mentally Retarded, O.G.C.A. § 37-5-2 (Code Ann. § 99-3302). For example, the Georgia statute states:

> The primary purpose of this chapter shall be to provide community-based alternatives to total institutional care so that mentally retarded individuals can continue to live in their home communities.

6 Congress authorized funding for deinstitutionalization to community based placements, based on its belief that institutional care is both "inappropriate and inhumane" for most mentally retarded people. H.R. Rep. 94-58, 94th Cong. 1st Sess., *reprinted in* [1975] U.S. Code Cong. & Admin. News, 919, 933 (1975).

able to accommodate only approximately 11 percent of the mentally retarded people who are in need of them. New York Office of Mental Retardation and Developmental Disabilities, New York State Plan: Mental Retardation and Developmental Disability (1981-1984), 144, 150 (Oct. 1980). In that one state alone, more than 34,800 mentally retarded people who in 1980 should have had community residence placements were unserved. *Id.* The time table for community placements set forth in the "Willowbrook Consent Decree" approved in *New York State Assoc. for Retarded Children v. Carey*, 393 F. Supp. 715 (E.D.N.Y. 1975), has been postponed at least twice. *See New York State Assoc. for Retarded Children v. Carey*, 711 F.2d 1136 (2d Cir. 1983).

A second source of demand for housing for mentally retarded persons results from demographic considerations. A government commission has noted that among the persons born during the post-World War II baby boom are a

> largely unidentified [and uncounted] group of developmentally disabled individuals who are residing in the community with aging relatives. Due to the increased longevity of the disabled individuals, caregivers become increasingly unable to provide the support required due to their own advancing age. The formal system will then need to play an increased role in individuals' care and treatment of the older developmentally disabled.

New York State Health Planning Commission, Community Alternatives: Changing Directions for Long Term Care 32 (unpubl. report: New York State Systems Development Project Dec. 1981).

If community residents are to continue benefitting from the services or programs created to meet their needs, and if unnecessarily institutionalized people are to be discharged from those settings, appropriate community-based living arrangements must be available. Because of their mental retardation, many individuals require the assistance or supervision in their daily activities offered by group homes. As the district court found, the availability of such a home in communities is an essential ingredient of normal living patterns for mentally retarded

people. (J.A. 94, Finding of Fact 30). For some, that setting will merely be temporary: it will provide a transitional setting where the person can learn the skills needed to live more independently. For others it will be permanent. In either event, living in family-scale community homes results in substantial increases in level of functioning and generally positive behavioral change for people with all levels of retardation. People who leave institutions for the community quickly make significant adaptive behavior gains relative to those who remain institutionalized.[7]

C. Mentally Retarded Citizens Make Good Neighbors And Do Not Negatively Affect Communities.

During the past ten to fifteen years the number of group homes in the nation has increased from 611 in 1971-72 to 6,302 in 1983, and their population has increased approximately from 23,500 in 1977 to between 43,000 and 58,000 in 1983.[8] This growth in group homes has permitted a corresponding decline in institutionalized populations, as unnecessary admission to and retention in institutions is prevented.[9]

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7 *See, e.g.*, Pennhurst Longitudinal Study, 1979 to 1983, Fourth Year Summary (unpubl. report: Temple Univ. Nov. 1983); U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 34 (Sept. 1983); S. Witt, *Increase in Adaptive Behavior Level After Residence in an Intermediate Care Facility for Mentally Retarded Persons*, 19 Mental Retardation 75, 77 (1981); D. Stacey, Doleys & Malcolm, *Effects of Social Skills Training in a Community-Based Program*, 84 Am. J. Mental Deficiency 152 (1979); B. Baker, Seltzer & Seltzer, *supra*, note 1 at 219; R. Mamula & N. Newman, Community Placement of the Mentally Retarded 6-7, 58 (1973).

8 Janicki, Mayeda & Epple, *Availability of Group Homes for Persons With Mental Retardation in the United States*, 21 Mental Retardation 45, 47, 50 (1983). The growth of group homes in Texas has paralleled the national trend. In 1976, Texas ranked seventh among all states with 23 group homes serving 467 residents. G. O'Connor, Home is A Good Place 16 (1976); between 1976 and 1983, the total number of group homes increased by almost 900 percent to 227, and the total number of persons served increased by 400 percent to 2,343. Janicki, Mayeda & Epple, *supra*, 21 Mental Retardation at 49.

9 Janicki, Mayeda & Epple, *supra* note 8, 21 Mental Retardation at 50.

Increasing the number of group homes has been possible only as a result of public recognition that mentally retarded people do not negatively affect the communities in which they live. In fact, initial community opposition to proposed group homes is by far the exception, not the rule.

Research on the actual experience of community residential facilities confirms that community responses are generally positive. In one early survey of 105 group homes, community acceptance was reported by approximately two thirds of the respondents, G. O'Connor, Home is a Good Place 23 (1976), and subsequent research has reported consistent initial community acceptance rates.[10] In addition, a 1975 Gallup Poll commissioned by the President's Committee on Mental Retardation reported that 85 percent of the sample would not object to a

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10 Pennhurst Longitudinal Study, *supra*, note 7 at 13 (community acceptance of group homes ranged from 62 to 84 percent); U.S. General Accounting Office, An Analysis of Zoning and Other Problems Affecting the Establishment of Group Homes for the Mentally Disabled 5 (Aug. 1983) (nationwide study of 535 group homes; 89 percent reported community acceptance); Lubin, *et al.*, *Community Acceptance of Residential Programs for Developmentally Disabled Persons*, 3 Applied Research in Mental Retardation 191 (1982) (community acceptance reported by 67 to 75 percent of respondents); E. Gollay, *et al.*, Coming Back 55 (1978) (80 percent of respondents reported community acceptance); B. Baker, Seltzer & Seltzer, *supra* note 1 at 215 (1977) (seven state study of group homes; 65 percent reported initial community acceptance); Berdiansky and Parker, *Establishing a Group Home for the Adult Mentally Retarded in North Carolina*, 15, Mental Retardation 8 (1977) (North Carolina group homes studied; 75 percent reported initial community acceptance).

In a survey of 279 superintendents of large public institutions for mentally retarded persons, 65 percent described the reactions of the surrounding community to placement efforts for institutionalized persons, as favorable or indifferent. Colombatto, *et al.*, *Perspectives on Deinstitutionalization*, 17 Educ. and Training of the Mentally Retarded, 6, 8 (1982).

group home of mildly or moderately mentally retarded people being located on their block.[11]

Despite the broad acceptance of mentally retarded people living in community-based group homes, irrational fears and negative attitudes continue to be held by some. Prejudice often is the result of ignorance resulting from the general public's lack of meaningful contact with their retarded peers. *See, e.g.*, G. Allport, The Nature of Prejudice (1958) (Separateness among groups leads to exaggeration of differences). If governmental discrimination against the retarded can be supported as rational based on the fears and prejudices of some members of the public, community integration of the retarded can be effectively frustrated.[12]

The Cleburne City Council relied on just such irrational fears in rejecting the application of the Cleburne Living Center; four of the seven factors were opposition of immediate neighbors, fears of the elderly, possible hostility from students at the junior high school across the street and "in general, the presentation made before the City Council." (J.A. 95, Finding of Fact 34).

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11 Gallup Organization Report for the President's Committee on Mental Retardation, *Public Attitudes Regarding Mental Retardation*, in Mental Retardation: Century of Decision (R. Natham Ed. 1976); *see also* Kastner, Reppucci & Pezzoli, *Assessing Community Attitudes toward Mentally Retarded Persons*, 84 Am. J. Mental Deficiency 137, 142 (1979) (restructure of Gallup Poll questions to gauge public attitudes to a specific proposed group home in their community; 81 percent still would not object to a group home on their block).

12 Many states (but not Texas) have passed legislation to prevent local governments from using zoning ordinances to exclude group homes or to force them to locate in the poorest, most rundown sections whose residents lack organized political power. *See, e.g.*, New York Mental Hygiene Law § 41.34. *See also* M. Lippincott, *"A Sanctuary for People": Strategies for Overcoming Zoning Restrictions on Community Homes for Retarded Persons*, 31 Stan. L. Rev. 767, 779 n.64 (1979) (citing 16 statutes in other states).

D. Mentally Retarded People Are Safe, Well Supervised Residents Posing No Threat To Their Neighbors.

Group home residents are rarely involved in behavioral or criminal incidents.[13] In a 2 year study of 1804 developmentally disabled persons living in the community, fewer than 1 percent were reported to have been in the custody of the law. E. Sitkei, Two Year Follow-Up on Mobility Rates for a Sample of Group Homes for Developmentally Disabled Persons (unpubl. paper June 1976), *cited in* Sigelman, Spahnel and Lorenzen, *Community Reaction to Deinstitutionalization*, 45 J. Rehabilitation, 52, 53 (1979). A second study of 20 family care homes in Fresno, California reported that 96 percent of the mentally retarded persons living there had no recorded behavioral difficulties in the community. R. Mamula and N. Newman, *supra*, note 7 at 59.

A recent study found that it is probably *safer* to be a neighbor of a group home because the arrest rate of 60 per thousand per year for adults in the general population is significantly higher than the 3 per thousand rate registered by mentally retarded residents of group homes. Lubin *et al.*, The Likelihood of Police Contacts with Developmentally Disabled Persons in Community Residences 5 (unpubl. report: New York State Office of Mental Retardation and Developmental Disabilities Feb. 1982). Few of the involvements of mentally retarded people with police were

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13 Unfounded fear of mentally retarded people is frequently listed as a reason for opposing group homes. *See* Okolo and Guskin, *Community Attitudes Toward Community Placement of Mentally Retarded Persons*, 12 Internat. Review of Research in Mental Retardation 25, 52 (1984); J. Colombatto, *supra*, note 10, 17 Educ. and Training of the Mentally Retarded 6 (1982); Margolis and Charitomidis, *Public Reactions to Housing for the Mentally Retarded*, 48 Exceptional Children 68 (1981); C. Sigelman, Spahnel & Lorenzen, *Community Reactions to Deinstitutionalization*, 45 J. Rehabilitation 52 (1979); Berdiansky and Parker, *supra*, note 10, 15 Mental Retardation 8 (1977); Wehbring and Ogren, Community Residences for Mentally Retarded People (unpubl. report: National Assoc. of Retarded Citizens May 1975); D. Lauber and F. Bangs, Zoning for Family & Group Care Facilities (American Society of Planning Officials, Planning Advisory Service Report No. 300 March 1974).

for antisocial behavior; of the few calls for police assistance, most were made by group home staff, and not by neighbors. *Id.* There also was no relationship between size of the group home and the likelihood of police intervention. *Id.* at 4.

These and other studies confirm that there is no rational basis for the fear that mentally retarded residents in a group home will place neighbors at greater risk of harm than if the group home was not in the neighborhood.[14]

In Cleburne, the group home and its residents would be a safe, well-supervised home largely indistinguishable from the other homes and residents in the neighborhood. Under both federal and state regulations applicable to ICF-MRs, residents of the group home will be carefully selected after testing and evaluation. 42 C.F.R. §§ 442.418; .421; .422; .456; 40 Texas Admin. Code (T.A.C.) §§ 27.3001(a); (b); .3004; .3005; .3006; (T. 69-70). In a Level I home, all of the residents will be of similar ages, developmental levels and social needs. 42 C.F.R. § 442.444(a); 40 T.A.C. § 27.3212(a). All residents must require only minimal care and supervision on a daily basis.[15] They must be ambulatory, 40 T.A.C. §§ 27.105(4); .2801; (T. 66); evaluated to have either mild or moderate mental retardation,

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14 *See* Lubin et al., Police Contacts, *supra*, at 5; Edgerton and Bercovici, *Failure in Community Adaptation: the Relativity of Assessment*, in Environment and Behavior: the Adaptation of Mentally Retarded Persons (K. Kerman, Begab & Edgerton Eds. 1983); Colombatto, *supra*, note 10, 17 Educ. & Training of the Mentally Retarded 6; Margolis and Charitonidis, *supra*, note 13, 48 Exceptional Children 681; Schalock, Harper & Genung, *Community Integration of Mentally Retarded Adults*, 85 Am. J. Mental Deficiency 478, 486 (1981); Sigelman, Spahnel and Lorenzen, *supra*, note 13, 45 J. Rehabilitation 52; Dybwad and Herr, *Unnecessary Coercion: An End to Involuntary Commitment of Retarded Persons*, 31 Stan. L. Rev. 753, 759 (1979); Trippi, *et al.*, *Housing Discrimination Toward Mentally Retarded Persons*, 44 Exceptional Children 430 (1978); Berdiansky and Parker, *supra*, note 10, 15 Mental Retardation 8; Nihira and Nihira, *Jeopardy in Community Placement*, 79 Am. J. Mental Deficiency 538 (1975); Wehbring and Ogren, *supra*, note 13.

15 *See* T. 140-41 (describing characteristics of mildly and moderately mentally retarded people); *see also People v. 11 Cornwell Co.*, 695 F.2d 34, 39n.2 (2d Cir. 1982) (describing characteristics of moderately mentally retarded people).

40 T.A.C. §§ 27.105(1); (T. 65); mild to moderate deficits in adaptive behavior, 40 T.A.C. § 27.105(2) and have no special health needs that would interfere with the program and services offered at the group home. 40 T.A.C. § 27.105(3). They also will be able to distinguish "right from wrong" (T. 109-111) and will not be aggressive (T. 110), mentally ill, alcoholic or felons. (T. 68).

The residents' lifestyle at the group home offers no support for community residents' fears. During the day, all the residents will be at work in the area, either in the competitive economy or in the local sheltered workshop. (J.A. 93, Finding of Fact 23); 40 T.A.C. § 27.105; (T. 67-68). At other times they will use community churches, shops, recreation facilities, and the library with as much or as little supervision as they individually require. 40 T.A.C. § 27.105; (T. 70; 192). During their unscheduled leisure time (which must not be for more than 3 continuous hours, 42 C.F.R. § 442.435(a)(1); 40 T.A.C. § 27.3203) residents will watch television or listen to the radio, visit friends, eat out, or go to the movies, just as most of the rest of us do.[16] Trained staff will be present 24 hours per day to respond to any resident's needs or an emergency. 42 C.F.R. § 442.481(f); 40 T.A.C. § 27.3804(f).

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16 *See, e.g.*, T. 232. One researcher reported the following as the most common leisure time activities among group home residents: watching television or listening to the radio, shopping, movies, parties, church, visiting friends and participation in sports. She concluded "[t]his represents a reasonable mix of activities in the home, structured activities with groups and exposure to community activities." E. Gollay, *supra* note 10 at 84. *See also* Wehman, *A Leisure Time Activities Curriculum for the Developmentally Disabled*, 11 Educ. and Training of the Mentally Retarded 309 (1976) (greater diversity in lifestyle can be obtained if leisure time is used constructively, including developing hobbies and friendships).

E. Group Homes Do Not Cause Property Values To Decline Or Neighborhood Characteristics To Change.[17]

The lack of negative impacts caused by group homes has been confirmed in numerous studies over a ten year period. Indeed, courts, when presented with results of empirical studies like those cited herein, have observed that the fears of diminished property values are without factual basis.[18]

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17 The City Council decision to deny the permit was based on conclusory statements of the community residents' opposition and fears, yet there is nothing in the record to show that the group home "will seriously injure the appropriate use of neighboring property", a finding required by the zoning ordinance. Zoning Ordinance, Section 16 (J.A. 62).

18 *See, Society For Good Will to Retarded Children, Inc. v. Cuomo*, 572 F. Supp. 1300, 1340-41 (E.D.N.Y. 1983) *rev'd on other grounds*, 737 F.2d 1239 (2d Cir. 1984); *J.T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc.*, 302 N.C. 64, 68-69 n.7, 274 S.E. 2d 174, 178 n.7 (1981) (referring to study of National Association of Realtors which found that property values had increased and not gone down in areas where group homes for the retarded were placed); *cf. Northwest Residence, Inc. v. City of Brooklyn Center*, 352 N.W. 2d 764, 770 (Minn. App. 1984) (court issued writ of mandamus compelling City Council to issue a special use permit for group home housing mentally ill, relying in part on national literature search by Minneapolis Planning Commission which found that there was no demonstration of decrease in property values unless there were five facilities in a block).

In the only case cited by petitioners where a court sustained a finding of diminished property values associated with location of a group home for the retarded, the court did not rely on results from an empirical study; instead, the finding was based on testimony of one real estate broker. *Garcia v. Siffrin Residential Assn.*, 63 Ohio St. 2d 259, 407 N.E. 2d 1369, 1380 (1980).

The presence of a group home has no effect on selling price,[19] on the percent of the sales price to the asking price,[20] on the rate of appreciation of property values,[21] on the rate of property turnover,[22] or on length of time the property is on the

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19 Dolan and Wolpert, Long Term Neighborhood Property Impacts of Group Homes for Mentally Retarded People (unpubl. report: Princeton Univ. Nov. 1982); D. Weiner, Anderson & Nietupski, *Impact of Community-Based Residential Facilities for Mentally Retarded Adults on Surrounding Property Values Using Realtor Analysis Methods*, 17 Educ. and Training of the Mentally Retarded 278 (1982); Minnesota Developmental Disabilities Program, An Analysis of Minnesota Property Values of Community Intermediate Care Facilities for the Mentally Retarded (ICF-MRs) (unpubl. report: State of Minn. Dep't of Energy, Planning and Development 1982); Collins and Broeneweg, Effects on Real Estate Transactions of Group Home Developments (unpubl. report: Vocational and Rehabilitation Research Institute, Calgary, Alberta 1982); Mambort, Thomas & Few, Community Acceptance (unpubl. report: Montgomery, Ohio Board of the Mentally Retarded and Developmentally Disabled 1981); Wagner and Mitchell, Group Homes and Property Values: A Second Look (unpubl. report: Metropolitan Human Services Comm'n Columbus, Ohio Aug. 1980); Wickwire and Goodale, *Promoting and Resisting Group Homes: The Property Value Issue*, 7 Leisurability 24 (1980); Lindauer, Tung & O'Donnell, The Effect of Community Residences for the Mentally Retarded on Real Estate Values in the Neighborhoods in which They are Located (unpubl. report: New York State Univ. College at Brockport, 1980); Goodale and Wickwire, *Group Homes and Property Values in Residential Areas*, 19 Plan Canada 154 (1979); Wolpert, Group Homes for the Mentally Retarded: An Investigation of Neighborhood Property Impacts (unpubl. report: Princeton Univ. Aug. 1978); D. Lauber and F. Bangs, *supra* note 13.

20 Wagner and Mitchell, *supra* note 19; Goodale and Wickwire, *supra* note 19, 19 Plan Canada at 161.

21 Mambort, Thomas & Few, *supra* note 19; Lindauer, Tung & O'Donnell, *supra* note 19; Goodale and Wickwire, *supra* note 19, 19 Plan Canada at 161.

22 Dolan and Wolpert, *supra* note 19 at 5, 12; Minnesota Developmental Disabilities Program, *supra* note 19; Collins and Broeneweg, *supra* note 19; Mambort, Thomas & Few, *supra* note 19; Goodale and Wickwire, *supra* note 19, 19 Plan Canada at 160; Wolpert, *supra* note 19; Knowles and Baba, The Social Impact of Group Homes (unpubl. report: Green Bay Wisc. Plan Comm'n 1973) *cited in* D. Lauber and F. Bangs, *supra* note 13 at 10.

market.[23] Indeed, some studies show enhanced values in some instances.[24]

In addition, a group home will not by itself cause any adverse change in the character of any neighborhood — single family residential or otherwise — in which it is located.[25] Inspections reveal that group homes are maintained at least as well if not better than surrounding homes, and that the homes are not conspicuous in their neighborhoods.[26] Neighborhood activity patterns do not change, *e.g.*, Knowles and Baba, *supra*, *cited in* D. Lauber and F. Bangs, *supra* note 13 at 10, and group homes do not cause any greater noise or traffic than do the other houses in the neighborhood. *Id.*

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23 Collins and Broeneweg, *supra* note 19 (found adjacent houses stayed on market marginally longer); Wagner and Mitchell, *supra* note 19; (no difference) Goodale and Wickwire, *supra* note 19 (no difference).

24 Weiner, Anderson & Nietupski, *supra* note 19; Wagner and Mitchell, *supra* note 19; Knowles and Baba, *supra* note 22.

25 The placement of a single group home, as would occur in Cleburne, is widely recognized to cause no change in the character of a neighborhood. Over concentration of group homes, however, is to be avoided because it would not provide a "normal" environment for the residents. This was the express finding of the New York Legislature, *see* N.Y. Mental Hygiene Law § 41.34(c)(5), *see also* New York State Senate Mental Hygiene and Addiction Control Committee, Site Selection of Community Residences for the Mentally Disabled: Historical Perspective and Legislation 26-27 (April 1979), *cited in Crane Neck Assoc. v. NYC/Long Island County Services Group*, 61 N.Y.2d 154, 165, 460 N.Y.S.2d 69 (1984), *appeal dismissed and cert. denied*, ___ U.S. ___, 105 S. Ct. 60 (1984). *Accord* Hopperton, Zoning For Community Homes: Technical Assistance Handbook for Municipal Officials 5, 6, 9, 10 (unpubl. report: Ohio St. Univ. College of Law Dec. 1975); D. Lauber and F. Bangs, *supra* note 13 at 13-14; 23-24.

26 Weiner, Anderson & Nietupski, *supra* note 19, 17 Educ. and Training of the Mentally Retarded at 281; Dolan and Wolpert, *supra* note 19 at 12-13; Mambort, Thomas & Few, *supra* note 19; G. O'Connor, *supra* at 18. *Accord*, *J.T. Hobby and Sons Inc. v. Family Homes of Wake Co.*, *supra* note 18, 274 S.E.2d at 180 (group home is not significantly different from neighboring houses, except that its residents are mentally retarded); *State v. District Court*, 609 P.2d 245, 248 (Mont. 1980); *Group Home of Port Washington v. Board of Zoning & Appeals*, 45 N.Y.2d 266, 273, 408 N.Y.S.2d 377 (1978); *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 305, 357 N.Y.S.2d 449 (1974).

F. Community Acceptance Of Group Homes Follows Their Establishment.

Finally, if *any* of these fears — of increased crime, falling property values, or change of neighborhood integrity — were at all valid, opposition to group homes would be expected to increase as those fears were realized. In short, "familiarity would breed contempt." Sigelman, Spahnel and Lorenzen, *supra*, note 13, 45 J. Rehabilitation at 54. However, the fears on which community opposition is based are merely "anticipatory, not experiential." Huey, *Placing the Mentally Retarded: Where Shall They Live?* 29 Hosp. and Community Psychiatry 596, 597 (1978). After group homes open whatever opposition may have been initially expressed fades after neighbors can see that their fears are unfounded. "Often, staff members reported that neighbors who at first were most strongly opposed to the home eventually became loyal friends." B. Baker, Seltzer & Seltzer, *supra* note 1 at 215.[27] In one nationwide study, 89 percent of the respondents reported community opposition had decreased after the group homes had opened. G. O'Connor, *supra* note 8 at 23. Another study concluded that "once mentally retarded resident had lived in a neighborhood, they tended to be accepted."

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27 A similar transformation of a man who "led the opposition" to a community residence in his neighborhood was described as follows:

> Both plaintiffs and defendants agreed that such fear is best refuted by the community's experience with their retarded neighbors. Gary Shaw now regards his retarded neighbors as his friends; he visits them in their home, and they visit him in his. The property value in his neighborhood has increased. Moreover, Shaw works with other communities in Nassau and Suffolk who are resisting group homes. "I would tell the people, I know where you are coming from, I know what you are afraid of, I went through it, and you don't have to worry."

Society for Good Will to Retarded Children v. Cuomo, 572 F. Supp. 1300, 1340-41 (E.D.N.Y. 1983), *rev'd on other grds.*, 737 F.2d 1239 (2d Cir. 1984).

R. Mamula and N. Newman, *supra* note 7 at 60. Growing community acceptance as a result of familiarity — in place of opposition — also was the conclusion by researchers at Pennhurst and Willowbrook.[28]

In summary, the prejudice and fear underlying the action of the Cleburne City Council is contrary to the wide body of information concerning mentally retarded people who are already living in group homes, and to the specific evidence in the record concerning the proposed group home in Cleburne. Zoning decisions that enforce negative community attitudes are a serious threat to realization of the national and state public policies to provide community based residential and other services to mentally retarded people. If community based living arrangements do not exist in sufficient numbers or in appropriate locations, that national and state public policy cannot be effected. This Court must not allow that policy to be thwarted simply on the basis of unfounded desires by community residents that the group home be established "anywhere but here" or "but not on my block."

II. THE OSTENSIBLE PROTECTION OF MENTALLY RETARDED PERSONS ASSERTED BY PETITIONERS HAD NO RATIONAL BASIS AND WAS A PRETEXT FOR THE EXCLUSION OF THE GROUP HOME FROM THE AREA.

A. The City Council Had No Knowledge Of Needs Of Mentally Retarded Persons And No Standards For Protecting Them.

Those local governments that attempt to evade federal and state policy favoring integration of mentally retarded persons into the community often adopt pretextual arguments to justify their underlying purpose to exclude mentally retarded individuals from living in supervised settings in their community.

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28 Pennhurst Longitudinal Study, 1979 to 1983, Fourth Year Summary 14 (unpubl. report: Temple Univ. Nov. 1983); D. Rothman and S. Rothman, The Willowbrook Wars: A Decade of Struggle for Social Justice 196 (1984).

Cleburne is no different in this respect. The District Court herein made it clear that exclusion of the mentally retarded was at the heart of the denial of the special use permit by the City Council. It found (J.A. 93, Finding of Fact 24):

> 24. If the potential residents of the Featherston Street home were not mentally retarded, but the home was the same in all other respects, its use would be permitted under the city's zoning ordinance.

The District Court also found that the denial of the permit "was motivated primarily by the fact that the residents of the home would be persons who are mentally retarded." (J.A. 94, Finding of Fact 29).

Nevertheless, petitioners continue to assert the same seven factors as below to justify their denial of the special use permit. *See* J.A. 95, Finding of Fact 34. Four of these "factors" are the expressions of irrational fears discussed above. The others are ostensible protections of the mentally retarded residents of the group home which are so far-fetched as to reveal their true exclusionary purpose. Even if the City Council had acted in good faith, its action is the kind of [d]iscrimination on the basis of handicap [that] . . . often occurs under the guise of a helping hand or a mistaken, restrictive belief as to the limitations of handicapped persons." *Pushkin v. Regents of the University of Colorado*, 658 F.2d 1372, 1385 (10th Cir. 1981).

The City Council acted without any knowledge of the needs of mentally retarded individuals (T. 12-13; 36-37; 47) in an area already extensively regulated by federal and state governments. 42 C.F.R. § 442 *et seq.*; 40 T.A.C. § 27 *et seq.* The State of Texas, in its brief *amicus curiae* herein, has advised the Court that in Texas the authority to determine how the needs of mentally retarded citizens are to be met is a state function and not one of local zoning authorization. The Cleburne Zoning Ordinance (J.A. 49 *et seq.*) itself has no standards relating to homes for the mentally retarded. As applied by petitioners, the Ordinance leaves the City Council complete discretion to bar all group homes. As the Court of Appeals stated, such power is "too dangerous" because "[t]here is too great a potential for blanket

discrimination, fueled by the very fears and prejudices that drove neighbors in this case to petition the City Council against the Featherston Home." (J.A. 133, 726 F.2d at 201).[29] Moreover, as the Court of Appeals found, the City did not offer any evidence in support of its claims that it was protecting mentally retarded persons by the denial of the permit. (J.A. 134-36; 726 F.2d at 200-02).

B. The Ad-Hoc Classification Of The Group Home As A "Hospital For The "Feeble-Minded".

In order to have the authority to exclude the group home, the Cleburne City Council had to classify it as a "hospital" rather than as one of several other more logical categories which are permitted uses within District R-3, for example, a single family dwelling, boarding house or dormitory. In contrast, other communities seeking to exclude group homes for mentally retarded persons from zones for single family dwellings have classified them as boarding houses. *Compare, e.g., J.T. Hobby and Sons, Inc. v. Family Homes of Wake Co., supra* note 18, 274 S.E.2d at 179; *Costley v. Caromin House,* 313 N.W.2d 21, 25 (Minn. 1981); *Crowley v. Knapp,* 94 Wisc. 2d 42, 288 N.W.2d 815, 824 (1979), *with* Petitioners' Brief at 30 (quoting Cleburne Zoning Ordinance definition of boarding houses). The group home

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29 The absence of standards or criteria in the zoning ordinance for securing a special use permit, in addition to being unacceptable to the Fifth Circuit, also is directly contrary to the recommendation of the American Society of Planning Officials.

> As with all special use permits, the zoning ordinance *should designate specific criteria* to guide the decision of the permit-granting agency. *Such criteria will increase the objectivity and lessen the influence of fear, prejudice, and political pressure on the decision making process.* This procedure permits the operator of a proposed facility to know in advance the conditions he must meet. . . .

D. Lauber and F. Bangs, *supra* note 13 at 23 (emphasis supplied). *See also* Hopperton, *supra* note 25 at 5 (conditions for issuance of permit should be specified in the ordinance).

herein is classified as a "hospital" even though no physicians or registered nurses will be employed at the home or be present on a regular basis (J.A. 93, Finding of Fact 23) and even though persons with significant medical needs are not eligible for residence under state regulations governing Level I ICF-MRs. 40 T.A.C. § 27.105(3); (T. 292).

The "hospital" classification also exemplifies the attitude of Cleburne toward its mentally retarded citizens. The Ordinance permits hospitals, sanitariums, nursing homes or homes for convalescents or aged of every nature, except for three — the insane, alcohol and drug addicts, and mentally retarded people (the "feeble-minded" in the words of the Zoning Ordinance), Section 8, No. 6 (J.A. 61).

The City also argues that the group home is a business, implying that its corporate status is relevant to its decision to exclude the group home. However,

> [R]esolution of the question of the nature of the usage of the property at issue does not turn upon the economic basis upon which the property is supported. That basis does not detract from the primary objective behind the operation of the facility and the essence of that operation: providing a non-institutional setting for normal human habitation and the activities incident thereto for mentally handicapped adults.

J.T. Hobby & Sons, Inc. v. Family Homes of Wake Co., supra note 18, 274 S.E.2d at 180. In addition, most permitted uses in the R-3 zone are businesses, and no rationale has been advanced to specially regulate the business of a group home as compared to any other business use.

C. The Pretext Of The Five Hundred Year Flood Plain.

The exclusion of the group home because it is located in an area where a flood may occur once in 500 years is a clear example of the pretextual nature of the City Council's action. The flood plain factor is not even considered for any other land use permitted in District R-3 or anywhere else in Cleburne. The City

has no general or specific flood plain planning requirement or regulation. The zoning ordinance does not even mention flood hazards or prohibit any uses because of flooding considerations. There is no evidence in the record that Cleburne had ever before considered a 500 year flood plain in reviewing a zoning application.

A variety of non-ambulatory individuals found in hospitals, sanitariums and nursing homes may live and be treated on the same site as that for the proposed group home, but the mentally retarded are excluded, even though, as the District Court found, all the residents would be "completely ambulatory." (J.A. 93, Finding of Fact 22). Federal and state regulations also require that residents of a Level I ICF-MR be ambulatory, 40 T.A.C. § 27.105(4); .2801; (T. 66) and capable of evacuating in case of emergency. *See* 42 C.F.R. §§ 442.505-506; 40 T.A.C. §§ 27.4601-4602; (T. 202).[30]

The group home "must have responsible staff members on duty and awake 24 hours a day to take prompt, appropriate action in the case of injury, illness, fire, or other emergency." 42 C.F.R. § 442.481(f); 40 T.A.C. § 3804(f). Both staff and residents are required to participate in evacuation drills at least four times per year, and on all shifts. 42 C.F.R. §§ 442.505-.506; 40 T.A.C. §§ 27.4601-.4602.

The irrationality of the City Council decision is made even more clear by comparing it to the extensive flood plain development regulations and restrictions issued by the federal government. Federal regulations do not require general flood hazard planning for land uses in a 500-year flood plain — the insignificant chance that a flood of that size would occur is considered too remote to warrant concern. *See* U.S. Water Resources Council, Flood Management Guidelines for Implementing Executive Order 11988, 43 Fed. Reg. 6030, 6043 (Feb. 10, 1978). The panel decision of the Fifth Circuit reached the same conclusion. (J.A. 136; 726 F.2d at 202). The bounds of the area to which federal

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30 Petitioner's Brief, p. 30, erroneously states that a mentally retarded person is not eligible for an ICF-MR if he or she could not cope in an emergency.

flood hazard planning regulations apply is the 100-year flood plain. 43 Fed. Reg. 6032. The only exceptions for occupied structures that are considered are schools, nursing homes and hospitals, the very types of facilities that are expressly permitted by Cleburne at the same location as the group home. 43 Fed. Reg. 6043. *See also* J.A. 133; 726 F.2d at 201 (comparing risks of group home and nursing home residents).

Petitioners' application of the non-existent flood risk to the group home, coupled with their failure to apply that criteria to institutions with non-ambulatory patients and to other types of institutions specifically covered by federal regulations, evidences the irrational nature of petitioners' decision.

D. The Pretext Of Space And Density Concerns.

The court below found that "[t]he same house with the same number of occupants would be a permitted use so long as the occupants were not mentally retarded." (J.A. 131-2, 726 F.2d at 200). *See also* J.A. 93, Finding of Fact 24. In response, Petitioners have asserted that their rejection of the group home at 201 Featherston is to protect the mentally retarded residents because of inadequacy of the size of the building and the lot. But as the record makes clear, the building and lot[31] meet every requirement ever imposed by the City of Cleburne under its zoning ordinance or any other city regulation. It also meets all applicable federal and state regulations in effect at the time the City Council rejected the application of respondent Cleburne Living Center. (J.A. 92, Finding of Fact 20).

Neither the Cleburne Zoning Ordinance or any other City ordinance prescribes minimum *per person* living space or recreation space, and, as the Fifth Circuit noted, the City has no occupancy limits for any permitted uses (J.A. 133, 726 F.2d at 201). Only in one setting, the single family home, is there any

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31 The building has 2,700 square feet of living space and the lot size is 16,000 square feet. (J.A. 135, 726 F.2d at 202); (T. 72-73).

requirement as to the size of the structure, 650 square feet of living floor area *per family*, Zoning Ordinance, Section 6 (J.A. 57), yet this requirement does not apply to density of residents, the ostensible concern now asserted by the City. Even in a one family house, so long as the size exceeds 650 square feet, Cleburne imposes no restriction on the number of persons who may reside in the home.[32] Cleburne allows a nursing home, a fraternity house, a boarding house, an apartment house or apartment hotel to cram as many people into a building as the occupant wishes.

The same form of regulation exists as to the total lot area that must be provided for various residential land uses. Those regulations prescribe minimum lot sizes *per family*, regardless of the number of persons who would actually live there. *See* (J.A. 57) (R-1 zone, 7,000 square feet for one-family dwelling); (J.A. 58) (R-2 zone; same as for R-1 and 3,500 square feet for 2-family dwelling); (J.A. 62) (R-3 zone; same as for R-2 plus 1,500 square feet for multiple-family dwelling). The property at 201 Featherston meets all lot size requirements specified in the Cleburne Zoning Ordinance. The record does not contain any evidence that Cleburne has ever applied a resident density criterion in any prior zoning decision.

The statement in Petitioners' Brief, p. 27, that 201 Featherston St. "could not function as boarding house, a permitted use, for fifteen unrelated adult men and women" is not supported by the record citations offered by Petitioners, or by any evidence elsewhere in the record. The two citations, J.A. 46 and J.A. 82, refer only to the size of the premises and make no reference to the legality of its use as a boarding house. The statement in the

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32 For example, Cleburne has no ordinance defining a "family" as a certain number of persons related by blood or marriage. Thus, the Cleburne ordinance is materially different from the ordinance reviewed in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), or *Macon Assoc. for Retarded Citizens v. Macon-Bibb Cty. Pl. & Zoning Comm'n*, 314 S.E.2d 218 (Ga. 1984), *appeal dismissed*, ___ U.S. ___, 105 S. Ct. 57 (1984).

same paragraph that density of residents may be regulated in some facilities by building codes and occupancy permits is equally unsupported by the citations and the record; the two citations in footnote 21 of Petitioners' Brief refer only to portions of the Zoning Ordinance, but that ordinance does not regulate resident density at all. Counsel for *amici* have been informed by Texas counsel that no ordinances or regulations exist in Cleburne which restrict the density of residents in a building.

Cleburne's assertion of power to regulate the density of residents within a group home is contrary to the position of the State of Texas that such regulation is the province of the State and not the City. *See amicus curiae* brief of State of Texas. Group homes for retarded persons are also regulated by comprehensive regulations of the State, 40 T.A.C. § 27 *et seq.*, and federal governments, 42 C.F.R. § 442 *et seq.* These regulations specify resident density in group homes, limiting occupancy to four persons per bedroom, and require sixty square feet of bedroom space per resident. 42 C.F.R. § 442.447; 40 T.A.C. § 27.3215. Cleburne lacks the power, and historically has never regulated, the operation of group homes, nursing homes, hospitals and the like; in such circumstances this Court has rejected the argument that the government entity was actually furthering an asserted government interest. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 105 (1976).

The sudden interest on the part of Cleburne, Texas in "protecting" the mentally retarded is simply a case of discrimination against thirteen mentally retarded individuals who would live in a group home in Cleburne. The prejudice and the unfounded fear underlying this discrimination operate to exclude mentally retarded persons from housing, their most pressing need.

CONCLUSION

For the reasons set forth above, the decision of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX A

Federal Statutes Promoting The Development Of Community-Based Residential Settings And Services For Mentally Retarded People

Developmental Disabilities Services and Facilities Construction Act of 1970, Pub L. No. 91-517, 84 Stat. 1376 (1970).

Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6001 *et seq.* (1976).

Education for all Handicapped Children Act of 1975, 20 U.S.C. § 1401 *et seq.*

Housing Act of 1959, 12 U.S.C. § 1701q.

Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 210(b), 88 Stat. 633 (1974).

Maternal and Child Health and Mental Retardation Planning Amendments of 1963, Pub. L. No. 88-156, 77 Stat. 275 (1963).

Mental Retardation Amendments of 1967, Pub. L. No. 90-170, 81 Stat. 527 (1967).

Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963, Pub. L. No. 88-164, 77 Stat. 282 (1963).

Mental Retardation Facilities and Community Mental Health Centers Construction Acts Amendments of 1965, Pub. L. No. 89-105, 79 Stat. 427 (1965).

Omnibus Budget and Reconciliation Act of 1981, Pub. L. No. 97-35, 97 Stat. 357 (1981).

Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* 89-97, 79 Stat. 286 (1965).

Social Security Acts Amendments of 1974, codified at Social Security Act, Title XIX, 42 U.S.C. § 1367-1397f.

Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2667 (1976).

Social Security Act, Title XIX, 42 U.S.C. § 1396d(c) and (d).